

No. 75-1419

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

DENNIS McDONALD A/K/A DENNIS MACDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES

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STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on both counts of an indictment charging conspiracy to obstruct and obstruction of commerce by extortion, in violation of 18 U.S.C. 1951. He was sentenced on January 16, 1975, to 15 years' imprisonment on each count, the sentences to run concurrently.

According to affidavits attached to the petition, on January 22, 1975, six days after sentence was imposed, petitioner's counsel mailed a notice of appeal to the district court and mailed copies to the United States Attorney and counsel for the co-defendant (Pet. App. D, pp. 19-20). The latter two persons received the notice on January 24, 1975 (Pet. App. E, p. 22; Pet. App. F, p. 24). The district court, however, apparently did not receive the notice and on February 5, 1975, a deputy clerk informed

petitioner's counsel by telephone that although the United States Attorney had received the notice, the court file did not contain it (Pet. App. E, pp. 20-21). When counsel's secretary told the deputy clerk that the notice had been mailed to the court on January 22, 1975, he "then told her to mail a copy of the notice directly to him" (*id.* at 20). On the same day, she mailed him an unsigned and undated copy of the notice, which the deputy clerk received (Pet. App. D, pp. 20-21; Pet. App. G, p. 25).

On July 28, 1975, 193 days after sentencing, petitioner's counsel filed a signed and dated notice of appeal in the district court (see Pet. App. A, p. 12; Pet. App. C, p. 15).

Both petitioner and the government filed extensive briefs in the court of appeals. On December 9, 1975, however, the court of appeals dismissed the appeal as untimely (Pet. App. A), and on March 9, 1976, denied rehearing (Pet. App. B, p. 14).

In the interim, petitioner filed a motion in the district court for an extension of time for filing his notice of appeal. Specifically, petitioner sought an extension of time *nunc pro tunc* to the day the district court received the unsigned and undated copy of the notice of appeal which petitioner's counsel had mailed on February 5, 1975. The district court denied the motion (Pet. App. C, pp. 15-17). The clerk's office for the Eastern District of Michigan informs us that petitioner has not appealed from the denial of this motion.

DISCUSSION

This is a troublesome case. Petitioner stands convicted of two serious felonies for which he has been sentenced to 15 years' imprisonment. Petitioner's counsel endeavored to file a timely appeal by mail, but the notice apparently never reached the district court, although the United States Attorney received a copy. Both sides filed briefs

on the merits in the court of appeals.¹ The court dismissed the appeal as untimely, however, because the only notice of appeal appearing in the record was not filed until 193 days after sentencing. The court acted on its own motion; the government did not suggest that the appeal was untimely.²

1. The literal language of Rule 4(b) of the Federal Rules of Appellate Procedure supports the action of the court of appeals. It provides:

In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. * * * Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

Petitioner did not comply with these requirements. He did not file in the district court a notice of appeal within ten days after the entry of judgment. The mere mailing of the notice within that period did not constitute a timely filing.³ The failure to file a timely notice is a jurisdictional

¹We are lodging a copy of the government's brief with the Clerk of this Court.

²At the request of the district judge, the United States Attorney filed a short memorandum in response to petitioner's motion in the district court to extend time; in pertinent part the memorandum points out that under Rule 4(b), Fed. R. App. P., the district court cannot extend the time for filing a notice of appeal more than 40 days after sentencing.

³Since the office of petitioner's counsel and the courthouse are located not only in the same city (Detroit) but in the same zip code area, it would not have been difficult for counsel to have physically filed the notice in the clerk's office.

defect warranting dismissal of the appeal. See *United States v. Robinson*, 361 U.S. 220, 229; *Durham v. United States*, 400 F. 2d 879, 880 (C.A. 10), certiorari denied, 394 U.S. 932; *Buckley v. United States*, 382 F. 2d 611, 614 (C.A. 10), certiorari denied, 390 U.S. 997; *United States v. June*, 503 F. 2d 442, 443 (C.A. 8); *United States v. Mathews*, 462 F. 2d 182, 183 (C.A. 3), certiorari denied, 409 U.S. 896; cf. *United States v. Smith*, 331 U.S. 469, 472-477.

Petitioner did not obtain an extension of time for filing a notice of appeal for an additional 30 days, on the basis of excusable neglect. On February 5, 1975, 20 days after imposition of sentence and 14 days after petitioner's counsel had mailed the notice of appeal to the court, the deputy clerk notified counsel that there was no notice of appeal in the court file. The mailing by counsel in response of an undated and unsigned copy of the notice was insufficient to constitute the timely filing of a notice because (1) the district court did not authorize the belated filing and (2) even if an extension of time for filing is authorized, the defendant still must file a proper notice of appeal, *i.e.*, one signed and dated. The "filing" of an undated and unsigned copy of the notice did not satisfy the requirement in the rule that "a notice of appeal * * * be filed" within the time limits the rule prescribes.⁴

Thus, there was a valid basis in Rule 4(b) for the court of appeals' conclusion that there was no "timely filed notice of appeal" and that the court therefore was "without jurisdiction to proceed in the cause" (Pet. App. A, p. 13).

⁴The district court thus justifiably denied petitioner's motion for an extension of time *nunc pro tunc* to the date the copy of the notice was received by the court clerk, since even if such a motion is proper under the rule, the defective notice need not have been considered sufficient to perfect the appeal.

2. Viewing the issue more broadly, however, the action taken by petitioner's counsel may properly be viewed as constituting substantial compliance with the rule and as satisfying the policy considerations that underlie it.

As petitioner points out (Pet. 6), the principal purposes of the notice requirement and time limitations are to give notice to the other parties of the intention to appeal and to prevent dilatory tactics which might prejudice the appellee or otherwise hinder effective appellate review. In this case, the United States Attorney and petitioner's co-defendant received timely notice of petitioner's intention to appeal. The United States Attorney received a copy of the notice of appeal eight days after sentence was imposed (see Pet. App. B), the same date on which petitioner's co-defendant's counsel received the notice. When petitioner's counsel learned that the court had not received the notice, he promptly endeavored to correct the deficiency by mailing a copy of the notice to the deputy district court clerk, as the latter had requested.

Petitioner was convicted of a serious crime and given a substantial sentence. The case was fully briefed in the court of appeals. The effect of the court of appeals' dismissal of the appeal on its own motion has been to deny petitioner appellate review of his conviction. In the particular circumstances of this case, where petitioner's counsel made good faith but inadequate efforts to perfect the appeal, fairness to the petitioner suggests that a less rigid approach than that the court of appeals took would be in order.

Accordingly, we suggest that it would be appropriate for the Court, in the exercise of its supervisory authority,

to grant the petition, reverse the judgment of the court of appeals dismissing the appeal as untimely, and remand to that court to consider the merits of the appeal.

Respectfully submitted.

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